

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
SUBSTANTIAL DEVELOPMENT PERMIT  
ISSUED BY PIERCE COUNTY TO  
RICHARD and JOAN WILSON,

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Appellant,

v.

PIERCE COUNTY and RICHARD and  
JOAN WILSON,

Respondents.

SHB No. 84-54

SUMMARY JUDGMENT ORDER

I

PROCEDURE

1. The Department of Ecology, (DOE) filed its Request for Review in this matter on October 18, 1984.

2. On March 8, 1985, the DOE withdrew its substantive objections to the project and submitted the case to the Board on Motion for Summary Judgment limited to the sole question of whether a variance

1 permit is required for the dock development at issue.

2 II

3 MATERIALS CONSIDERED

4 The following were considered by the Board upon this Motion for  
5 Summary Judgment:

6 1. Minutes, Office of the Hearings Examiner, Pierce Co. Case No.  
7 SD15-84 and Findings, Conclusions and Decisions, July 11, 1984.

8 2. Application for Substantial Development Permit of Richard and  
9 Joan Wilson with project drawings.

10 3. Pierce County Staff report on application of Richard and Joan  
11 Wilson.

12 4. Motion for Summary Judgment, together with supporting  
13 affidavits of Jay J. Manning and Nora Jewett, filed by DOE on March 8,  
14 1985.

15 5. Brief in Opposition to Motion for Summary Judgment filed by  
16 Pierce County on February 27, 1985.

17 6. Memorandum in Support of Motion for Summary Judgment filed by  
18 DOE on March 8, 1985.

19 7. The prior decisions of the Board cited herein, and the Pierce  
20 County Shoreline Master Program (WAC 173-19-350) of which official  
21 notice is taken pursuant to WAC 461-08-185(2).

22 III

23 UNDISPUTED FACTS •

24 1. There are no genuine issues of material fact.

25 2. On this motion the following are undisputed:

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1 a. Richard and Joan Wilson applied to Pierce County on their  
2 own behalf for permission to construct and maintain a single use dock  
3 to serve property abutting the waters of Vaughn Bay in the county.

4 b. The shoreline designation of the dock site is "rural"  
5 under the Pierce County Shoreline Master Program (PCSMP).

6 c. The dock was approved by the County for a total length of  
7 170 feet.

8 d. The dock, as approved, would not exceed 15% of the fetch  
9 of (distance across) Vaughn Bay.

10 e. Fifteen percent of the fetch at the location in question  
11 is approximately 247 feet.

12 f. Special circumstances exist which render a 150 foot dock  
13 impractical at the site. The larger dock, as approved, would impose  
14 no significant additional adverse shorelines impacts.

15 IV

16 ISSUE PRESENTED

17 Does a single use dock exceeding the lesser of 15% of the fetch or  
18 150 feet in length require a variance permit for approval under the  
19 PCSMP?

20 IV

21 CONCLUSIONS OF LAW

22 1. The original Pierce County Shoreline Master Program (PCSMP)  
23 was approved by the Department of Ecology (DOE) on April 4, 1975.  
24 Although not offered into evidence on this record, we take official  
25 notice of its terms as set forth in our earlier decision of Kooley and

1 Pierce County v. Department of Ecology, SHB No. 218 (1976). Tha  
2 original master program provided:

3 Residential docks on salt water, when allowed, shall  
4 meet the following design criteria:

5 1. Maximum length shall be fifty (50) feet or  
6 only so long as to obtain a depth of eight (8)  
feet, whichever is less at mean lowest low  
water.

7 Design Criteria, P. 99 (Emphasis added).

8 In Kooley, the proposed development consisted of a pier, dock and  
9 float exceeding 50 feet in length (Finding of Fact I). Applying the  
10 master program to the proposed development in Kooley, we concluded  
11 that (1) a variance was necessary, and (2) Department of Ecology's  
12 denial of same was correct. We also stated, however:

13 . . . a long, shallow tidal run-out is common in the  
14 area, and appellant and others similarly situated  
15 must seek relief by virtue of that circumstance  
16 through an amendment of the master program itself.  
That can only be accomplished by the county  
legislative body with the approval of the Department  
of Ecology.

17 2. Within one year after Kooley, Pierce County amended its master  
18 program to delete the language applied in Kooley. In lieu of that  
19 language which prescribes that docks shall have a maximum length of 50  
20 feet or obtain a depth of 8 feet whichever is less, the following was  
21 adopted:

22 B. Development guidelines - In lieu of specific  
23 standards relating to design, location, bulk  
24 and use, the following guidelines shall be  
25 applied by the County's reviewing authority to  
26 a site specific project application for  
Substantial Development Permit in arriving at  
a satisfactory degree of consistency with the  
policies and criteria set forth in this

Chapter. To this end the County may extend, restrict or deny an application to achieve said purposes.

. . .

6. Single user piers and docks.

(a) Maximum intrusion into water should be only so long as to obtain a depth of eight (8) feet of water as measured at mean lower low water on salt water shorelines, or as measured at ordinary high water on freshwater shorelines, except that the intrusion into water of any pier or dock should not exceed the lesser of fifteen (15%) percent of the fetch or 150 feet on salt water shoreline and 40 feet on fresh water shorelines.

PCSMP Section 65.56.040 GENERAL CRITERIA AND GUIDELINES FOR REVIEWING SUBSTANTIAL DEVELOPMENT PERMITS. (Amended Res. #19803, June 14, 1977). (Emphasis added).

Department of Ecology approved this amended language on October 26, 1977. WAC 173-19-350. This is the language applicable to the proposed development.

3. We review the proposed development for consistency with the applicable (Pierce County) shoreline master program and the Shoreline Management Act (SMA). RCW 90.58.140(2)(b).

4. The PCSMP does not require a variance for the proposed development. Both the language of Section 65.56.040(B) and its evolution from earlier language support this conclusion. In direct, unbroken sequence following our decision in Kooley, cited above, Pierce County amended its shoreline master program to delete the specific standard for dock length and substitute the concept that, "In lieu of specific standards relating to design, location, bulk and use,

1 the following guidelines shall be applied...." PCSMP Section  
2 65.56.040(B) (Emphasis added). The purpose of a variance is stated  
3 within WAC 173-14-150 of the DOE:

4 The purpose of a variance is strictly limited to  
5 granting relief to specific bulk, dimensional or  
6 performance standards set forth in the applicable  
master program . . . (Emphasis added).

7 The stated purpose of a variance would be thwarted by applying it to  
8 Pierce County's unspecific guideline rather than a specific standard.  
9 Pierce County has repealed its specific standard for dock length in  
10 order to tailor its decisions to tidal run-outs of varying length.  
11 Dock proposals should be judged by the Pierce County guidelines as  
12 interpreted in Northey v. Pierce Co. and Marshall, SHB No. 84-6  
13 (1984), and not by the rules for shoreline variance. Department of  
14 Ecology v. Pierce Co. and Martel, SHB No. 84-26 (1984). Department of  
15 Ecology v. Pierce Co. and Murphy, SHB No. 84-28 (1984), DOE v. Pierce  
16 Co. and Franklin, SHB No. 84-29 (1985), and DOE v. Pierce Co. and  
17 Darrah, SHB No. 84-44 (1985).

18 5. In Northey, Martel, Murphy, Franklin, and Darrah cited above,  
19 we concluded that the word "should" is permissive rather than  
20 mandatory in the guideline at PCSMP Sec. 65.56.040(B). We concluded,  
21 however, that (1) special circumstances must exist which render a  
22 150-foot dock impractical, and (2) that a longer dock must have no  
23 significant, additional adverse impact before a dock longer than 150  
24 feet can be allowed. There is no issue as to these substantive  
25 concerns in the instant case.

6. The proposed development has not been shown to be inconsistent with chapter 90.58 RCW, the Shoreline Management Act.

7. A shoreline variance is not required for the proposed development.

NOW THEREFORE, IT IS ORDERED that Department of Ecology's Motion for Summary Judgment is denied and its request for review is dismissed as a matter of law.

DONE at Lacey, Washington, this 18th day of July, 1985.

SHORELINES HEARINGS BOARD

~~LAWRENCE J. FAULK, Chairman~~

See Dissenting Opinion  
GAYLE ROTHROCK, Vice Chairman

Wick Dufford

WICK DUFFORD, Lawyer Member

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Rodney M. Kerslake  
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LES ELDRIDGE, Member

LES ELDRIDGE, Member

William A. Garrison

WILLIAM A. HARRISON  
Administrative Appeals Judge

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1 GAYLE ROTHROCK - DISSENTING

2 I would grant the Motion for Summary Judgment and, thereby, have  
3 the subject permit remanded to Pierce County for review and permit  
4 processing under shorelines variance criteria in order to have the  
5 20-foot extension to the proposed 170 foot dock properly considered.

6 A variance permit is:

7 strictly limited to granting relief to specific bulk,  
8 dimensional or performance standards set forth in the  
applicable master program.... WAC 173-14-150.

9 PCSMP Section 65.56.040(B)(6) is effectively a dimensional  
10 standard imposed on piers or docks.

11 6. Single user piers and docks.

12 a. Maximum intrusion into water should be only  
13 so long as to obtain a depth of eight feet of water  
14 as measured at mean lower low water on salt water  
15 shorelines or as measured at ordinary high water in  
16 fresh water shorelines, except that the intrusion  
into the water of any pier or dock should not exceed  
the lesser of 15 percent of the fetch or 150 feet on  
saltwater shorelines and 40 feet on fresh water  
shorelines.

17 This establishes the desired size and length for piers and docks  
18 in Pierce County shorelines, and to vary from this standard the  
19 criteria in WAC 173-14-150 should be met. At the very least, special  
20 use criteria articulated by a local government--a sort of local  
21 embodiment of statewide variance criteria--should be employed to  
22 further discipline and guide dock length decisions. Otherwise, what  
23 value is the standard in 7a. above? The language there is surely not  
24 a frivolity or meaningless phrase. Regrettably, Pierce County has no  
25 written special use criteria, nor do they seek to employ variance

26 ROTHROCK--DISSENTING  
27 SHB No. 84-54



1 criteria. Nothing in the master program explains when larger or  
2 longer docks would be appropriate. Thus, there is no manner in which  
3 special circumstances can be weighed and measured without the County  
4 being subject to charges of arbitrariness or capriciousness on any  
5 particular dock permit decision.

6 Failing to construe PCSMP Section 65.56.040(B)(7) as holding a  
7 dimensional standard violates the rule of liberal construction of the  
8 Shoreline Management Act (SMA). See RCW 90.58.900. Hama Hama v.  
9 Shorelines Hearings Board, 85, Wn.2d 441, 446 (1975); and Hayes v.  
10 Yount, 87 Wn.2d 280, 289 (1976). Interpreting the "should" in the  
11 section in question as something less than an obligation runs counter  
12 to several state court decisions. State v. LaPorte, 58 Wn.2d 816,  
13 823, 365 P.2nd 24 (1961); Lashley v. Korbort, 26 Ca. 2nd 83, 156 P.2nd  
14 441; and others. Adhering to an interpretation of this master program  
15 section as permissive, not standard-setting or obligatory offends, the  
16 SMA whose stated purpose is planned and rational use of the shorelines.

17  
18   
19 GAYLE ROTHROCK, Vice Chairman